Supreme Court, U.S.
FILED

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IN THE

United States Supreme Court

October Term, 1994

No. _____

REEL PIPE & VALVE COMPANY, INC., et al.
Petitioners

v.

THE CONSOLIDATED CITY OF INDIANAPOLIS — MARION COUNTY, et al.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

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October 20, 1994

QUESTION PRESENTED

Does our Constitution give State government the power to administratively declare private property "blighted" for condemnation purposes without providing actual notice of the public hearing and opportunity to remonstrate against the blight designation and thus the question is whether want-ad style notice of hearing published in a newspaper is adequate notice under the due process clause of the Fourteenth Amendment? *Mullane*, *Mennonite* and *Tulsa*, revisited.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, Reel* Pipe & Valve Company, Inc., Viola Sheffield and Andrew Sheffield, Jr., d/b/a Swancy's Auto Laundry, Eleanor Swatts, Hobart Banks, Greg Knox, Evelyn Rusthoven, and Jeanetta B. Greene, and the Respondents, the Consolidated City of Indianapolis — Marion County, The Metropolitan Development Commission and James Wade, Jr., Julie Scott, Randolph Snyder, James Curtis, Sr., William Brown, Lois Horth, Mary Ann Mills, Michael Rodman and Dr. Jack Hall, in their capacities as appointed members of the Metropolitan Development Commission and The Department Of Metropolitan Development, Division Of Economic And Housing Development.

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* Reel Pipe & Valve Company, Inc. has no parent or subsidiary company.

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THE CONSOLIDATED CITY OF INDIANAPOLIS — MARION COUNTY, et al.
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

The Petitioners, Reel Pipe & Valve Company, Inc., Viola Sheffield and Andrew Sheffield, Jr., d/b/a Swancy's Auto Laundry, Eleanor Swatts, Hobart Banks, Greg Knox, Evelyn Rusthoven, and Jeanetta B. Greene, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Indiana entered in the above entitled proceeding on April 26, 1994 and Petition For Transfer to the Supreme Court of Indiana was denied July 27, 1994.

OPINIONS BELOW

The opinion of the Marion Superior Court Sitting *En Banc* denying the administrative appeal of Petitioners is unreported and is reprinted in the appendix hereto, p. A-1, *infra*.

The decision of the Court of Appeals of Indiana affirming the Marion Superior Court Sitting *En Banc* is reported at 633 N.E.2d 274 and is reprinted in the appendix hereto, p. A-9, *infra*.

The Supreme Court of Indiana denied transfer in an unreported order dated the 27th day of July, 1994 and it is reprinted in the appendix hereto, p. A-21, *infra*.

JURISDICTION

The Petitioners are businesses and individual residents owning and occupying real estate in Indianapolis — Marion County, Indiana near the central city. Their private property was declared blighted in 1982 in proceedings to which they had no notice nor knowledge. They did not appear at a public hearing and remonstrate nor appeal in 1982. The blight designation has been determined to be final.

In 1992 Petitioners were added to the acquisition list and received actual notice by mail of a public hearing and opportunity to remonstrate. They appeared but were not allowed to contest the blight designation of their businesses and residences. They appealed to the Marion Superior Court Sitting *En Banc* and subsequently to the Court of Appeals of Indiana and Supreme Court of Indiana. The opinion of the Court of Appeals sustaining the trial court was handed down on the 26th day of April, 1994. A timely Petition To Transfer to the Indiana Supreme Court was denied on the 27th day of July, 1994.

The jurisdiction of this Court to review this final judgment of the Court of Appeals of Indiana is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

The Court of Appeals of Indiana adequately set out the facts of the case in its April 26, 1994 opinion. Excerpts from the opinion, as found in the Appendix are set out as follows:

> "On March 12, 1982, the Commission approved a proposed resolution declaring a large section of the City of Indianapolis as blighted, deteriorated and deteriorating. The affected area was bordered on the north by 10th Street, 11th Street and Interstate Highway 65, bordered on the south by New York Street, bordered on the east by Senate Avenue and Capitol Avenue, and bordered on the west by West Street and Indiana Avenue.
>
> ****

Pursuant to statute, notice of the Commission's resolution was published in three newspapers: The Indianapolis Recorder, The Indianapolis Star and The Indianapolis News. The notice indicated that maps, plats, and an Urban Renewal Plan had been prepared and were available for inspection at the offices of the Commission. The notice also set a time, date, and location for public hearing at which any person interested in or affected by the proceedings could appear and be heard.

Plaintiffs-Appellants Reel Pipe & Valve Company, Inc., Viola Sheffield and Andrew Sheffield, Jr., d/b/a Swancy's Auto Laundry, Eleanor Swatts, Hobart Banks, Greg Knox, Evelyn Rusthoven, and Jeanetta B. Greene (referred collectively as "Landowners") all own real estate property located within the area designated as blighted. Landowners did not appear at the April 21, 1982 public hearing at which the Commission confirmed and adopted the proposed resolution.

***

In 1992, the Commission adopted a proposed amendment to the 1982 resolution. Because the amendment sought to add additional parcels of land in the redevelopment area to the existing list of property to be acquired, affected property owners were given notice by certified mail.

Public hearings were held May 6, 1992, and June 17, 1992. In addition to written submissions, the Commission received testimony in support of and in opposition to the proposed amendment.

****

The Commission heard testimony that in order for the area to be redeveloped, additional property near the canal, including Landowners' properties, needed to be acquired by the Commission in order that marketable parcels for redevelopment compatible with the overall redevelopment plans for the area may be realized. The Commission also heard testimony that the City plans to assemble marketable parcels along the restored canal for redevelopment of multi-family housing, commercial, and research and technology uses.

Landowners opposed inclusion of their property on the list of property to be acquired but did not object to the overall project of improving the canal and redevelopment area. *Landowners were not permitted to cross examine witnesses nor introduce evidence challenging the 1982 resolution declaring the area as blighted.* (Emphasis added.)

After considering the testimony and evidence presented at the hearing, the Commission approved and adopted the Consolidated Redevelopment Project Area III, Northwest Redevelopment Project Urban Renewal Plan (Resolution 92-43) along with an acquisition list that included Landowners' property. Thereafter, Landowners appealed the Commission's decision to the Marion Superior Court sitting *en banc*. After conducting a hearing, the court in a six to three vote affirmed the Commission. In so doing, the court set forth detailed Findings of Fact and Conclusions of Law including a finding that Landowners would have the opportunity to challenge the Commission's blight determination in any future eminent domain proceedings. This appeal arose in due course."

Petitioners raised three issues on appeal, namely:

1. Whether the Commission's "blighted area" designation is void because owners of property located in the area received no actual notice of the 1982 public hearing at which the designation was adopted.

2. Whether the Commission's decision adding appellants' property to the acquisition list is void because Landowners were denied an opportunity to challenge the "blighted area" designation at a 1992 public hearing.

3. Whether the trial court erred in finding that Landowners will have the right to contest the "blighted area" designation in any future eminent domain proceedings.

The Court of Appeals of Indiana ruled against Petitioners on issues 1 and 2 and found those issues to be dispositive. In a footnote the Court indicates that Petitioners will be unable to challenge the blighted area designation in any future eminent domain proceeding.

The Court thus adopted the pretext that the Commission determination was a legislative function which did not trigger a constitutional right to notice. The Court further held that the 1982 public hearing was not a proceeding adversely affecting Petitioners' property interests and determined as a matter of law that notice by mail was not constitutionally required. The Court further found that the fact that Petitioners' real estate was not blighted was of no moment if they were in an area which was blighted.

REASONS FOR GRANTING THE WRIT

Since the end of World War II, states and municipalities have used the police power to protect health, safety and welfare of citizens in order to upgrade decaying central cities. The purpose was laudable and the efforts were assisted by friendly legislation and court decisions in most states. The problem is, times have changed.

Those seeking to use urban renewal to take private property for private purposes today were not alive in the Depression nor

during the World War II years when central cities decayed and became blighted. The purpose today is to acquire and clear large tracts of land by using the draconian power of eminent domain and then sell the cleared land to private developers. The method used to accomplish the taking of private property for another private use is the pretext that clearing "blight" is the necessary public purpose. The subsequent selling to a private developer is simply an ancillary proceeding of clearing blight. Petitioners assert their real estate is not blighted, but have had no opportunity to introduce evidence to protect their property.

During the same period of time since 1950, this Court has developed a line of constitutional law holding that private property cannot be taken or affected without "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". This is the minimal requirement mandated by the due process clause of the Fourteenth Amendment. The Court first made this declaration of constitutional law in 1950 in *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865.

Not all of the states were listening, however, and in 1983, this Court reversed the Court of Appeals of Indiana in *Mennonite Bd. of Missions v. Adams* (1983), 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180.

Oklahoma did not listen and this Court was again called upon in 1988 to reassert the broad constitutional principle in *Tulsa Professional Collection Services. Inc. v. Pope*, (1988), 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565.

These three cases covered the factual situations of a trust accounting, a tax sale, and probate proceedings. This Court must be ever vigilant, however, to protect all property rights and in particular, rights in real estate against the draconian power of eminent domain. This case will give the Court the opportunity to level the playing field in the eminent domain

area and rule upon broad issues of notice, public use, delay and the like.

CONCLUSION

The Court should take the opportunity to expand upon the concepts of notice and private property and revisit the trilogy of *Mullane*, *Mennonite* and *Tulsa*.

Respectfully submitted,

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Appendix

STATE OF INDIANA	)	IN THE MARION
	) SS:	SUPERIOR COURT
COUNTY OF MARION	)	GENERAL TERM

REEL PIPE & VALVE COMPANY, INC. VIOLA SHEFFIELD, JEANETTA B. GREEN, et al.	)	
Plaintiffs,	)	CONSOLIDATED ACTION NOS.
vs	)	49D05-9206-CP-0682
	)	49D05-9206-MI-0690
CONSOLIDATED CITY Or INDIANAPOLIS-MARION COUNTY, et al.	)	49DO5-9206-CP-0692
Defendants.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

These Consolidated Appeals were called for hearing before the Marion Superior Court, *en banc*, pursuant to I.C. §36-7-15.1-11 on the 24th day of July, 1992. The Plaintiff, Reel Pipe & Valve Company, Inc., appeared in person and by its counsel, Douglass R. Shortridge. The Plaintiffs, Viola Sheffield, etal appeared in person and by their counsel, Jerry W. Newman. The Defendants, Consolidated City of Indianapolis-Marion County, etal appeared by their counsel, David F. Hamilton, David R. Warshauer, and J. Mark Mutz, of the law firm of BARNES & THORNBURG, and by Joseph M. Perkins, Jr., of the City-County Legal Division.

The Court, having heard the arguments of counsel, having examined the papers and pleadings on file in this cause, having taken this matter under advisement and now being duly advised, now makes the following Findings of Fact:

FINDINGS OF FACT

1. On June 17, 1992, the Metropolitan Development Commission (the "Commission") approved Resolution No. 92-43, which amended the Northwest Redevelopment Project plan pursuant to the Redevelopment Act (Ind. Code §36-7-15.1-10.5).

2. These consolidated appeals of the Commission's resolution are brought pursuant to Ind. Code §36-7-15.1-11. In accordance with such Section, these appeals have been consolidated and heard by all available judges of the Marion Superior Court within the statutory time limit.

3. Also pursuant to Ind. Code §36-7-15.1-11, these appeals are being decided on the record and evidence before the Commission in this matter.

4. All plainfiffs in these consolidated appeals own real property in the Northwest Redevelopment Project Area in Indianapolis, Indiana.

5. Plaintiff Reel Pipe & Valve Company, Inc. is an Indiana corporation which owns several parcels where it operates its business on North Senate Avenue.

6. Plaintiffs Viola Sheffield and Andrew Sheffield, Jr., own real property at 934 North Senate Avenue and operate a business there.

7. Plaintiff Eleanor Swatts owns real property and resides at 935 Fayette Street.

8. Plaintiff Hobart Banks owns real property at 939 Fayette Street.

9. Plaintiffs Greg Knox and Evelyn Rusthoven own real property and reside at 340 West 11th Street.

10. Plaintiff Jeanetta B. Greene owns real property and resides at 342 West 11th Street.

11. The Consolidated City of Indianapolis-Marion County (the "City") is a consolidated city pursuant to Ind. Code §§36-3-1-1, *et seq.*

12. The Commission is established pursuant to Ind. Code §36-7-4-202(c).

13. The Department of Metropolitan Development the "Department") is an executive department of the City created pursuant to Ind. Code §36-3-5-4(a)(2).

14. Defendants James Wade, Jr., Julie Scott, Randolph Snyder, James Curtis, Sr., William Brown, Lois Horth, Mary Ann Mills, Michael Rodman, and Dr. Jack Hall are the members of the commission and are sued here only in their official capacities.

15. The Commission established the Northwest Redevelopment Project in 1982 through its Resolution Nos. 81 and 108 in 1982. Through those resolutions, the Commission found that the designated area was a "blighted area" within the meaning of Ind. Code §§36-7-15.1-1 *et seq.*, that the "blighted area constitutes a menace to the social economic interest of the City of Indianapolis and its inhabitants, and that it will be of public utility to rehabilitate/redevelop said area under the provisions" of the Redevelopment Act.

16. In support of its 1982 Resolution, the Commission found that one-fourth of the land had been cleared and left vacant; one-third of all residences were vacant; one-fifth of all buildings were vacant and one-third had major structural defects; the population of the area had dropped significantly from 1969 to 1981; the area was part of the highest crime area in the City; the area required disproportionate public spending on crime, public health and safety, fire and accident prevention and other public services; and the visibly deteriorating conditions detracted seriously from the quality of residential life and undermined improvement efforts in the project area and surrounding areas.

17. The Commission found the area to be blighted and adopted an urban renewal plan for the area after a public hearing held after notice by publication in accord with Ind. Code §36-7-15.1-10(a).

18. The Commission has amended the Northwest Redevelopment Project Plan several times since 1982, including an amendment in 1986 to consolidate the Northwest Redevelopment Project with other redevelopment areas in the City.

19. In 1992 the Commission began considering amendments to the Northwest Redevelopment Project Urban Renewal Plan which would include adding to the acquisition list several blocks adjacent to the old Central Canal between St. Clair Street and Interstate 65.

20. Pursuant to statute, all property owners whose property was being considered for the acquisition list received notice by mail sent ten days or more before the Commission planned to consider the proposed amendments at its meeting on May 6, 1992.

21. Several property owners, including plaintiffs Reel Pipe & Valve Company, Greg Knox, Evelyn Rusthoven, and Viola and Andrew Sheffield, Jr., filed written remonstrances before the first public hearing on May 6, 1992. Reel Pipe & Valve Company and Evelyn Rusthoven asked that the public hearing be continued, and the Commission granted their requests. The Commission heard some evidence on May 6, 1992, from persons who wished to speak at that time, including plaintiffs Greg Knox, Andrew Sheffield, Jr., Eleanor Swatts and Evelyn Rusthoven.

22. On May 20, 1992, the Commission continued the public hearing on Resolution No. 92-43 to June 17, 1992.

23. On June 17, 1992, the Commission completed the public hearing on Resolution 92-43. At that hearing, the Commission heard testimony from all persons who wished to speak, including plaintiffs Gregory Knox, Evelyn Rusthoven, Reel Pipe & Valve Company (by its attorney), and Andrew Sheffield, Jr.

24. At the public hearings on May 6, 1992, and June 17, 1992, and in written submissions, the Commission received testimony in support of the proposed amendments from the Mayor's

special counsel, the Department of Metropolitan Development, the Indianapolis Economic Development Corporation, the Commission for Downtown, and Indianapolis Power & Light Company.

25. In support of the proposed amendment, the City presented testimony that it proposes to spend approximately $10 million restoring and improving the northern portion of the Central Canal to complete the Canal Walk Project already underway south of St. Clair Street; that the canal improvements south of St. Clair Street have involved public investments of about $25 million which are fostering additional investments of approximately $165 million; and that when completed, those development projects will provide more than 1870 housing units, and nearly 500,000 square feet of commercial, office and development facilities where more than 1600 people will be employed.

26. The Commission heard testimony that some business properties are needed for physical construction of the canal improvements.

27. The Commission also heard testimony that in order for the area to be redeveloped, additional property near the canal, including the plaintiffs' properties, needs to be acquired in view of the need to have marketable parcels for redevelopment compatible with the overall redevelopment plan for the area.

28. The Commission heard testimony that the City plans to assemble marketable reuse parcels along the restored canal for redevelopment for multifamily housing, commercial, and research and technology uses.

29. Although all plaintiffs opposed inclusion of their property on the acquisition list, none of the plaintiffs opposed the overall project of improving the canal and redeveloping the area.

30. The plaintiffs contend they were denied due process of law because they were not given actual notice of the Commission's hearing in 1982 at which the Commission found the Northwest Redevelopment Project Area was blighted.

31. The plaintiffs further contend that their property will be taken for a private purpose rather than a public purpose because the property will be resold to private developers for no public purpose or use.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over these consolidated appeals pursuant to Ind. Code §36-7-15.1-11.

2. That the law is with the Defendants and against the Plaintiffs herein.

3. Because there was no actual notice of the determination of blight in 1982, such determination did not deprive any plaintiff of any property interest. The determination was instead a preliminary and legislative step in the process that may lead to exercise of the City's eminent domain power.

4. The Commission's actions to date have not yet effected a taking of any plaintiff's property.

5. No plaintiff's property can be taken by eminent domain except through judicial condemnation proceedings pursuant to Ind. Code §§32-11-1-1 *et seq*. Those judicial proceedings, if they occur, will provide property owners with notice and an opportunity to show the proposed taking is not for a public purpose.

6. Where the legislative determination of blight is made, without actual notice to the affected property owners, such determination does not foreclose the right of the property owners to contest such determination.

7. Because actual notice of the initial determination of blight was not provided to the plaintiffs, they have the right to contest each determination in any eminent domain proceeding that may ensue. As a result, plaintiffs were not deprived of due process of law by the Commission's 1982 decision to establish the Northwest Redevelopment Project and to declare the area blighted.

8. The issue of public purpose is not ripe for consideration because no eminent domain proceedings have begun. Those proceedings, if and when they occur, will provide the proper forum for deciding the public purpose issue.

9. Because due process entitles property owners to object to condemnation on the ground that the taking is not for a public purpose, the Commission resolution does not deny the plaintiffs of due process of law.

10. That for the foregoing reasons, Resolution 92-43 of the Commission should be affirmed.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court now enters the following Judgment:

JUDGMENT

It is, therefore, ORDERED, ADJUDGED AND DECREED that judgment shall be, and is hereby, entered in favor of the Defendants, Consolidated City of Indianapolis-Marion County, etal and against the Plaintiff, Reel Pipe & Valve Company, Inc., and Resolution No. 92-43 of the Metropolitan Development Commission shall be, and is hereby, affirmed.

All of which is ORDERED, ADJUDGED AND DECREED this 27th day of July, 1992.

/s/ James S. Kirsch
JAMES S. KIRSCH,
Presiding Judge
Marion Superior Court

JUDGES VOTING TO AFFIRM:

Barney, Deiter, Gifford, Johnson, Kirsch, Lopossa, Metz, Miller, Payne, Zore, JJ.

JUDGES VOTING TO REVERSE:
Brewer, Darden, Hanley, JJ.

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IN THE
COURT OF APPEALS OF INDIANA
FIFTH DISTRICT

REEL PIPE & VALVE)
COMPANY, INC.,)
VIOLA SHEFFIELD AND)
ANDREW)
SHEFFIELD, JR., d/b/a)
SWANCY'S)
AUTO LAUNDRY;)
ELEANOR SWATTS AND)
HOBART BANKS; GREG)
KNOX; AND)
EVELYN RUSTHOVEN,)

JEANETTA B. GREENE, Appellants-Plaintiffs,	)
vs.	) No. 49A05-9211-CV-403
THE CONSOLIDATED CITY OF INDIANAPOLIS-MARION COUNTY, et al., Appellees-Defendants.	)

APPEAL FROM THE MARION SUPERIOR COURT
Sitting En Banc
Cause No. 49D05-9206-CP-0682
(Consolidated with Cause Nos.
49D05-9206-M10690 and 49D05-9206-CP-0692)

RUCKER, J.

STATEMENT OF THE CASE

The Marion Superior Court sitting *en banc* affirmed a resolution of the Metropolitan Development Commission (Commission) which amended a plan adopted under provisions of the Indiana Redevelopment Act. The resolution provided in part that certain real property located in an area previously designated as blighted should be included on a list of property to be acquired by the Commission. Landowners whose property was added to the list now appeal.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Commission's "blighted area" designation is void because owners of property located in the area received no actual notice of the 1982 public hearing at which the designation was adopted.

2. Whether the Commission's decision adding appellants'

property to the acquisition list is void because Landowners were denied an opportunity to challenge the "blighted area" designation at a 1992 public hearing.

3. Whether the trial court erred in finding that Landowners will have the right to contest the "blighted area" designation in any future eminent domain proceedings.

We affirm.[1]

BACKGROUND

This case arises under provisions of the Indiana Redevelopment Act (the Act) which sets forth a comprehensive statutory scheme for the clearing, replanning, and redevelopment of blighted, deteriorated, and deteriorating areas in a redevelopment district. Ind. Code 1-30. Under the statute a consolidated city[2] is vested with authority to establish a Metropolitan Development Commission to carry out provisions of the Act. The Commission's duties include investigating, studying and surveying blighted, deteriorated and deteriorating areas; selecting and acquiring areas to be redeveloped; and replanning and disposing of the areas in a manner that best serves the social and economic interests of the city and its inhabitants. I.C. § 36-7-15.1-6. The Commission may purchase any real or personal property needed for redevelopment of blighted areas; clear real property acquired for redevelopment purposes; and

---

[1]Because issues one and two are dispositive we decline to address issue three. We note, however, there is recent authority that suggests Landowners will not be able to challenge the "blighted area" designation at any future eminent domain proceedings. In *City of Evansville v. Reising* (1989), Ind.App., 547 N.E.2d 1106, *trans. denied*, we held, "[a] factual question as to whether an area is blighted cannot be raised in an eminent domain condemnation proceeding . . . Such questions relating to the factual situation upon which a declaratory resolution is based must be raised by remonstrance and appeal within the statutory framework provided by the legislature . . ." *Id.* at 1110 citing *Suttmiller v. City of Batesville* (1967), 248 Ind. 391, 393, 226 N.E.2d 893, 894.

[2]According to the 1990 federal census and Ind. Code § 36-4-1-1, Indianapolis is the only consolidated city in the State of Indiana.

exercise the power of eminent domain in the name of the City. I.C. § 36-7-15.1-7.

Once the Commission finds that an area in a redevelopment district has become blighted it must prepare maps and plats describing the affected area, list the owners of property proposed to be acquired and estimate the cost of acquisition and redevelopment. I.C. § 36-7-15.1-8. Thereafter, the Commission must adopt a proposed resolution declaring that the blighted area is a detriment to the social or economic interests of the city and its inhabitants, and that it will be of public utility and benefit to acquire and redevelop the area. *Id.* After the Commission determines whether the proposed resolution and redevelopment plan conforms to the comprehensive plan of redevelopment for the city, the Commission must then either approve or disapprove the proposed resolution and plan. I. C. § 36-7-15.1-9.

Once the resolution and plan have been approved, the Commission must give notice by newspaper publication of the approval and substance of the resolution. I.C. § 36-7-15.10. Among other things, the notice must identify the date when the Commission will receive and hear remonstrances and other testimony from interested parties. *Id.* At the hearing, the Commission shall hear all persons interested in the proceedings. After considering the evidence presented, the Commission shall take final action determining the public utility and benefit of the proposed project, and confirming, modifying and confirming, or rescinding the resolution. *Id.* If the Commission thereafter proposes to amend the resolution, then a subsequent public hearing must be conducted. Notice by certified mail must be given to affected property owners if the proposed amendment either enlarges the boundaries of the area by more than 20% or adds one or more parcels of land to the existing list of property to be acquired. I.C. § 36-7-15.1-10.5.

Any party aggrieved by the decision of the Commission may appeal to the Superior Court which must hear the matter sitting *en banc*. I.C. § 36-7-15.1-11. The Court then decides the

appeal based on the record and evidence before the Commission, not by trial de novo. By at least a majority vote, the judges may either confirm the final action of the Commission or sustain the remonstrances. *Id.*

STATEMENT OF THE FACTS

On March 12, 1982, the Commission approved a proposed resolution declaring a large section of the City of Indianapolis as blighted, deteriorated and deteriorating. The affected area was bordered on the north by 10th Street, 11th Street and Interstate Highway 65, bordered on the south by New York Street, bordered on the east by Senate Avenue and Capitol Avenue, and bordered on the west by West Street and Indiana Avenue. In support of the resolution, the Commission found that one-fourth of the land had been cleared and remained vacant, one-third of all residences were vacant, one-fifth of all buildings were vacant, one-third of the buildings had major structural defects, and the population of the area had dropped significantly from 1969 to 1981. According to the Commission, the area required disproportionate public spending on crime, public health and safety, fire and accident prevention and other public services, and the visibly deteriorating conditions detracted seriously from the quality of residential life and undermined improvement efforts in the project area and surrounding areas. *Record* at 73.

Pursuant to statute, notice of the Commission's resolution was published in three newspapers: The Indianapolis Recorder, The Indianapolis Star and The Indianapolis News. The notice indicated that maps, plats, and an Urban Renewal Plan had been prepared and were available for inspection at the offices of the Commission. The notice also set a time, date, and location for public hearing at which any person interested in or affected by the proceedings could appear and be heard.

Plaintiffs-Appellants Reel Pipe & Valve Company, Inc., Viola Sheffield and Andrew Sheffield, Jr., d/b/a Swancy's Auto Laundry, Eleanor Swatts, Hobart Banks, Greg Knox, Evelyn

Rusthoven, and Jeanetta B. Greene (referred collectively as "Landowners") all own real estate property located within the area designated as blighted. Landowners did not appear at the April 21, 1982 public hearing at which the Commission confirmed and adopted the proposed resolution.

As funds became available over the next several years the Commission proceeded with its urban renewal project. The project included construction and rebuilding of a residential housing development known as Lockfield Gardens, restoration of the historic Madame Walker Theatre, and partial redevelopment of a 19th Century Canal referred to as the Canal Walk Project.

In 1992, the Commission adopted a proposed amendment to the 1982 resolution. Because the amendment sought to add additional parcels of land in the redevelopment area to the existing list of property to be acquired, affected property owners were given notice by certified mail.

Public hearings were held May 6, 1992, and June 17, 1992. In addition to written submissions, the Commission received testimony in support of and in opposition to the proposed amendment. The City of Indianapolis presented testimony that it proposed to spend approximately Ten Million Dollars restoring and improving the northern portion of the Central Canal to complete the Canal Walk Project already underway south of St. Clair Street; that the canal improvements south of St. Clair Street have involved public investments of about $25 million which are fostering additional investments of approximately $165 million; and that, when completed, those developments will provide more than 1,800 housing units, and nearly 500,000 feet of commercial, office and development facilities where more than 1,600 people will be employed.

The Commission heard testimony that in order for the area to be redeveloped, additional property near the canal, including Landowners' properties, needed to be acquired by the Commission in order that marketable parcels for redevelop-

ment compatible with the overall redevelopment plans for the area may be realized. The Commission also heard testimony that the City plans to assemble marketable parcels along the restored canal for redevelopment of multi-family housing, commercial, and research and technology uses.

Landowners opposed inclusion of their property on the list of property to be acquired but did not object to the overall project of improving the canal and redevelopment area. Landowners were not permitted to cross examine witnesses nor introduce evidence challenging the 1982 resolution declaring the area as blighted.

After considering the testimony and evidence presented at the hearing, the Commission approved and adopted the Consolidated Redevelopment Project Area III, Northwest Redevelopment Project Urban Renewal Plan (Resolution 92-43) along with an acquisition list that included Landowners' property. Thereafter, Landowners appealed the Commission's decision to the Marion Superior Court sitting *en banc*. After conducting a hearing, the court in a six to three vote affirmed the Commission. In so doing, the court set forth detailed Findings of Fact and Conclusions of Law including a finding that Landowners would have the opportunity to challenge the Commission's blight determination in any future eminent domain proceedings. This appeal arose in due course.

DISCUSSION AND DECISION

I.

Landowners first contend the Commission's "blighted area" designation is void because Landowners did not receive actual notice of the 1982 public hearing at which the designation was adopted and approved. Citing *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865; *Mennonite Bd. of Missions v. Adams* (1983), 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180; and *Tulsa Professional Collection Services. Inc. v. Pope*, (1988), 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565, Landowners argue that actual notice is a

minimum constitutional precondition to any proceeding which will adversely affect the liberty or property interest of any party. Landowners do not contend that the statute requiring notice by publication is unconstitutional. Rather, they argue that because the 1982 hearing was a proceeding adversely affecting their property interest, notice by mail was constitutionally required. We disagree.

The trilogy of Supreme Court cases relied on by Landowners all stand for the same principle, namely: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314, 70 S.Ct. at 657. Applying the *Mullane* principle, the Supreme Court also held "actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party . . . ." (Emphasis in original.) *Tulsa*, 485 U.S. at 485, 108 S.Ct. at 1344 quoting *Mennonite*, 462 U.S. at 800, 103 S.Ct. at 2712.

Contrary to Landowners argument, the foregoing authority does not mandate actual notice of the 1982 public hearing. We first observe the actual determination of blight was not made at the hearing. That determination had already been made by the Commission pursuant to statute. The public hearing, conducted also pursuant to statute, was designed to allow interested parties an opportunity to remonstrate against the decision. In that regard the Commission engaged in a legislative function determining that preliminary steps needed to be taken in order to ultimately acquire certain properties in the designated area by eminent domain.

There is no question that a property owner is constitutionally guaranteed and entitled to just compensation when his or her property is appropriated for public use. Nor is there any question that a property owner is entitled to notice and hearing on the question of just compensation. However, a property

owner has no constitutionally protected right to participate in a legislative decision which may or may not lead to future eminent domain proceedings. *Rassi v. Trunkline Gas Company* (1968), 262 Ind. 1, 240 N.E.2d 49, 53; *Slentz v. Fort Wayne* (1954), 233 Ind. 226, 118 N.E.2d 484, *citing Bragg v. Weaver* (1919), 251 U.S. 57, 40 S.Ct. 62, 64 L.Ed. 135. As the *Rassi* court observed:

> There is much authority to the effect that the extent of the public necessity for a proposed improvement, the suitableness of the location selected, and the consequent necessity of taking the land selected for its site are all questions for the legislature to determine, and the courts have no power to interfere or substitute their own views for those of the legislature unless the action by the legislature is arbitrary.

240 N.E.2d at 53.

In this case, the Commission determined that the area here in dispute is blighted. Such determination was a proper legislative function which did not trigger a constitutional right to notice. Further, Landowners do not allege, nor does the record support the notion that the Commission acted arbitrarily in reaching its decision.

Assuming for the sake of argument that Landowners were entitled to remonstrate at the 1982 public hearing and thereby contest the blight determination, their contention that they were entitled to actual notice of the hearing nonetheless fails. Actual notice is constitutionally required only where the proceeding will adversely affect a person's liberty or property interest. *Mennonite*, 462 U.S. at 801, 103 S.Ct. at 2712. Here, the record does not show how or in what manner the blight determination hearing adversely affected Landowners' interests. In their brief, Landowners assert the 1982 blight determination "effectively froze [their property's] use, lowered it value and restrained free alienation." *Brief of Appellants*, p. 25. However, there is no evidence in the record before us which

supports this assertion. The record does not indicate that after the blight determination was made the Division of Economic and Housing Development for the City of Indianapolis had to approve any building permits, or zoning or other changes in the blighted area. There is nothing in the record, however, indicating that Landowners sought and were denied any such permits or zoning changes.

We also must reject Landowners' contention that the mere declaration of blight is itself an unconstitutional taking for which actual notice is required. To the contrary, the process of declaring an area blighted and adding property to the acquisition list does not result in the taking of property. Rather, only after proceeding with these preliminary steps may the Commission begin the process of actually acquiring property by eminent domain. *See accord Robinette v. Chicago Land Clearance Comm'n* (1951), N.D.Ill., 115 F.Supp. 559. Because the proceeding is only a preliminary step in a long process of actually acquiring property, it is not a final adjudication of Landowners' rights and for this additional reason no actual notice was required. *See Calhoun v. Jennings* (1987), Ind., 512 N.E.2d 178, *reh'g denied* (issuance of a tax deed not a final adjudication of rights as the title is subject to challenge in a quiet title action).

We hold that the 1982 public hearing at which the blighted area determination was confirmed and adopted by the Commission was not a proceeding adversely affecting the Landowners' property interest. Thus, notice by mail was not constitutionally required.

II.

Landowners next contend the Commission's decision adding their property to the acquisition list is void because Landowners were denied an opportunity to challenge the 1982 "blighted area" determination at the 1992 public hearing. Landowners cannot prevail on this issue because the Commission was not required to revisit the question of blight. The law is clear. Indiana Code § 36-7-15.1-10.5 provides in relevant part:

> (c) When the commission proposes to amend a resolution or plan, the commission is not required to have evidence or make findings that were required for the establishment of the original redevelopment area, urban renewal area, or economic development area.

Only where the proposed amendment enlarges the original boundaries of the area by more than twenty percent (20%) is the Commission required to reconsider the blight issue. Ind. Code § 36-7-15.1-10.5(f).

The proposed amendments here did not include an enlargement of the original boundaries of the blighted area. Rather, the amendments involved the inclusion of additional properties to be added to the acquisition list, and the modification of certain sections of the land use provisions of § 10.5 of the Act, the Commission was not required in 1992 to hear evidence or make findings on the 1982 determination of blight.

In a related vein, Landowners argue their property is not blighted. In support of their argument, Landowners contend that if their property actually represented a public health and safety nuisance, then the Commission would not have taken nearly ten years to "formally assert its right to condemn Appellants' property." *Brief of Appellants*, p. 30. Thus, Landowners conclude, not only is their property not blighted but also the equitable doctrine of laches prohibits the Commission from asserting otherwise.

Landowners' argument fails for a number of reasons. First, the fact that Landowners' individual property is not blighted is of no moment. The relevant issue is whether Landowners' property is located in an *area* that is blighted. See *Muffay v. Richmond* (1971), 257 Ind. 548, 276 N.E.2d 519; *Alanel Corp. v. Indianapolis Redevelopment Comm'n* (1958), 239 Ind. 35, 154 N.E.2d 515. Next, Landowners' property has not been condemned. Rather, it has merely been placed on a list. At some point in the future, the Commission may or may not proceed to acquire such property by eminent domain through judicial condemnation pursuant to Ind. Code § 32-11-1-1 to -13. Also,

Landowners have not shown that the doctrine of Laches applies in this case. Laches is an affirmative defense that must be pleaded and proved and cannot be raised for the first time on appeal. *Goebel v. Blocks & Marbles Brand Toys, Inc.* (1991), Ind.App., 568 N.E.2d 552. In their complaint before the *en banc* trial court, Landowners did not raise Laches as an affirmative defense, but, rather, make the assertion for the first time before this court. Thus, the issue is waived for the appellate review.

Waiver notwithstanding, Landowners' argument nonetheless fails. Laches involves 1) inexcusable delay in asserting a right, 2) implied waiver of the right arising from knowing acquiescence in existing conditions, and 3) circumstances causing prejudice to the adverse party. *Taylor v. Metropolitan Development Commission* (1982), Ind.App., 436 N.E.2d 1157.

Among other things, the element of inexcusable delay is absent here. The Act anticipates that a project area will be redeveloped in stages. This is only logical and comports with sound urban planning because any comprehensive redevelopment effort results in a considerable drain on public finances. The Act, for example, acknowledges that a redevelopment project should only be pursued "to the extent that money is available for that purpose." Ind. Code § 36-7-15.1-12. The record here reveals that redevelopment of the blighted area is a long-term project that the Commission has pursued over a number of years. Between 1982 and 1990, the Redevelopment Plan has been amended at least four times. On each occasion properties were added to the acquisition list. As funds became available during that time the Commission proceeded with its urban renewal project. The project included construction and rebuilding of a residential housing development known as Lockfield Gardens, the restoration of the historic Madame Walker Theatre, and partial redevelopment of a 19th Century Canal referred to as the Canal Walk Project. The addition of Landowners' property to the acquisition list in 1992 was simply the latest in a long series of steps the Commission has taken to

redevelop the area. The ten-year delay in adding Landowners' property to the acquisition list was neither inexcusable nor unreasonable. As a result there was no laches.

Judgment affirmed.

C.J. SHARPNACK and
J. NAJAM, CONCUR.

CLERK OF THE SUPREME COURT
COURT OF APPEALS AND TAX COURT

DWAYNE M. BROWN, Clerk

Cause Number
49A05-9211-CV-00403

Lower Cause
49D05-9206-CP-0682

REEL PIPE & VALVE CO. etal

v.

MARION CTY, CITY OF

You are hereby notified that the Supreme Court has on this day 7/27/94 Appellant's Petition to Transfer is hereby denied. Roger O. DeBrueler, Acting Chief Justice. All Justices concur, except Shepard, C.J., who is not participating.

Witness my name and the seal of said Court,
this 27th day of July, 1994

_____

Dwayne M. Brown